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THE HISTORY OF ASSUMPSIT.

I. — EXPRESS ASSUMPSIT.

THE mystery of consideration has possessed a peculiar fascination for writers upon the English Law of Contract. No fewer than three distinct theories of its origin have been put forward within the last eight years. According to one view, "the requirements of consideration in all parol contracts is simply a modified generalization of *quid pro quo* to raise a debt by parol."[1] On the other hand, consideration is described as "a modification of the Roman principle of *causa*, adopted by equity, and transferred thence into the common law."[2] A third learned writer derives the action of assumpsit from the action on the case for deceit, the damage to the plaintiff in that action being the forerunner of the "detriment to the promisee," which constitutes the consideration of all parol contracts.[3]

To the present writer[4] it seems impossible to refer consideration to a single source. At the present day it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor. But this definition of consideration would not have covered the cases of the six-

[1] Holmes, Early English Equity, 1 L. Q. Rev. 171; The Common Law, 285. A similar opinion had been previously advanced by Professor Langdell. Contracts, § 47.

[2] Salmond, History of Contract, 3 L. Q. Rev. 166, 178.

[3] Hare, Contracts, Ch. VII. and VIII.

[4] It seems proper to say that the substance of this article was in manuscript before the appearance of Judge Hare's book or Mr. Salmond's Essay.

teenth century. There were then two distinct forms of consideration: (1) detriment; (2) a precedent debt. Of these detriment was the more ancient, having become established, in substance, as early as 1504. On the other hand, no case has been found recognizing the validity of a promise to pay a precedent debt before 1542. These two species of consideration, so different in their nature, are, as would be surmised, of distinct origin. The history of detriment is bound up with the history of special assumpsit, whereas the consideration based upon a precedent debt must be studied in the development of *indebitatus assumpsit*. These two forms of assumpsit will, therefore, be treated separately in the following pages.

The earliest cases in which an *assumpsit* was laid in the declaration were cases against a ferryman who undertook to carry the plaintiff's horse over the river, but who overloaded the boat, whereby the horse was drowned;[1] against surgeons who undertook to cure the plaintiff or his animals, but who administered contrary medicines or otherwise unskilfully treated their patient;[2] against a smith for laming a horse while shoeing it;[3] against a barber who undertook to shave the beard of the plaintiff with a clean and wholesome razor, but who performed his work negligently and unskilfully to the great injury of the plaintiff's face;[4] against a carpenter who undertook to build well and faithfully, but who built unskilfully.[5]

In all these cases, it will be observed, the plaintiff sought to recover damages for a physical injury to his person or property caused by the active misconduct of the defendant. The statement of the *assumpsit* of the defendant was for centuries, it is true, deemed essential in the count. But the actions were not originally, and are not to-day, regarded as actions of contract. They have always sounded in tort. Consideration has, accordingly, never played any part in the declaration. In the great majority of

[1] Y. B. 22 Ass. 94, pl. 41.

[2] Y. B. 43 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on the Case, 37; Y. B. 3 H. VI. 36, pl. 33; Y. B. 19 H. VI. 49, pl. 5; Y. B. 11 Ed. IV. 6, pl. 10; Powtuary *v.* Walton, 1 Roll. Ab. 10, pl. 5; Slater *v.* Baker, 2 Wils. 359; Sears *v.* Prentice, 8 East, 348.

[3] Y. B. 46 Ed. III. 19, pl. 19; Y. B. 12 Ed. IV. 13, pl. 9 (*semble*).

[4] 14 H. VII. Rast. Ent. 2, b. 1.

[5] Y. B. 11 H. IV. 33, pl. 60; Y. B. 3 H. VI. 36, pl. 33; Y. B. 20 H. VI. 34, pl. 4; Y. B. 21 H. VI. 55, pl. 12; 18 H. VII. Keilw. 50, pl. 4; 21 H. VII. Keilw. 77, pl. 25; Y. B. 21 H. VII. 41, pl. 66; Coggs *v.* Bernard, 2 Ld. Ray. 909, 920; Elsee *v.* Gatward, 5 T. R. 143. See also Best *v.* Yates, 1 Vent. 268.

the cases and precedents there is no mention of reward or consideration. In Powtuary *v.* Walton[1] (1598), a case against a farrier who undertook to cure the plaintiff's horse, and who treated it so negligently and unskilfully that it died, it is said: "Action on the case lies on this matter without alleging any consideration, for his negligence is the cause of the action, and not the *assumpsit.*" The gist of the action being tort, and not contract, a servant,[2] a wife,[3] or a child,[4] who is injured, may sue a defendant who was employed by the master, the husband, or the father. Wherever the employment was not gratuitous, and the employer was himself the party injured, it would, of course, be a simple matter to frame a good count in contract. There is a precedent of assumpsit against a farrier for laming the plaintiff's horse.[5] But in practice assumpsit was rarely, if ever, resorted to.

What, then, was the significance of the *assumpsit* which appears in all the cases and precedents, except those against a smith for unskilful shoeing? To answer this question it is necessary to take into account a radical difference between modern and primitive conceptions of legal liability. The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor.[6] Newton, C.J.: "Perhaps he applied his medicines *de son bon gré,* and afterwards your horse died; now, since he did it *de son bon gré,* you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse

[1] 1 Roll. Ab. 10, pl. 5. See also to the same effect, Reg. Br. 105 b.
[2] Everard *v.* Hopkins, 2 Bulst. 332. [3] Pippin *v.* Sheppard, 11 Price, 400.
[4] Gladwell *v.* Steggall, 5 B. N. C. 733.
[5] 2 Chitty, Pl. (7 ed.) 458. [6] Y. B. 19 H. VI. 49, pl. 5.

dies; shall the plaintiff have an action? I say, No." Paston, J.: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C. J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed, still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.[1]

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant."[2] This is, of course, not law to-day, and probably was not law when written. Blackstone simply repeated the doctrine of the Year-Books.[3] The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken, in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.

An express *assumpsit* was originally an essential part of the plaintiff's case in another class of actions, namely, actions on the case against bailees for negligence in the custody of the things intrusted to them. This form of the action on the case originated later than the actions for active misconduct, which have been already considered, but antedates, by some fifty years, the action of assumpsit. The normal remedy against a bailee was detinue. But there were strong reasons for the introduction of a concurrent remedy by an action on the case. The plaintiff in detinue might be defeated by the defendant's wager of law; if he had paid in advance for the safe custody of his property, he could not recover in detinue his money, but only the value of the property; detinue could not be brought in the King's Bench by original writ; and the procedure generally was less satisfactory than that in case. It is

[1] See to the same effect Y. B. 48 Ed. III. 6, pl. 11; 11 R. II. Fitz. Ab. Act. on Case, 37; Rast. Ent. 463 b.

[2] 1 Bl. Com. 431.

[3] Y. B. 11 Ed. IV. 6, pl. 10; 1 Roll. Ab. 94, pl. 1; 1 Roll. Ab. 95, pl. 1.

not surprising, therefore, that the courts permitted bailors to sue in case. The innovation would seem to have come in as early as 1449.[1] The plaintiff counted that he delivered to the defendant nine sacks of wool to keep; that the defendant, for six shillings paid him by the plaintiff, assumed to keep them safely, and that for default of keeping they were taken and carried away. It was objected that detinue, and not case, was the remedy. One of the judges was of that opinion, but in the end the defendant abandoned his objection; and Statham adds this note: . . . "*et credo* the reason of the action lying is because the defendant had six shillings which he [plaintiff] could not recover in detinue." The bailor's right to sue in case instead of detinue was recognized by implication in 1472,[2] and was expressly stated a few years later.[3]

The action against a bailee for negligent custody was looked upon, like the action against the surgeon or carpenter for active misconduct, as a tort, and not as a contract. The immediate cause of the injury in the case of the bailee was, it is true, a nonfeasance, and not, as in the case of the surgeon or carpenter, a misfeasance. And yet, if regard be had to the whole transaction, it is seen that there is more than a simple breach of promise by the bailee. He is truly an actor. He takes the goods of the bailor into his custody. This act of taking possession of the goods, his *assumpsit* to keep them safely, and their subsequent loss by his default, together made up the tort. The action against the bailee sounding in tort, consideration was no more an essential part of the count than it was in actions against a surgeon. Early in the reign of Henry VIII., Moore, Sergeant, said, without contradiction, that a bailee, with or without reward, was liable for careless loss of goods either in detinue or case;[4] and it is common learning that a gratuitous bailee was charged for negligence in the celebrated case of Coggs *v.* Bernard. If there was, in truth, a consideration for the bailee's undertaking, the bailor might, of course, declare in contract, after special assumpsit was an established form of action. But, in fact, there are few instances of such declarations before the reign of Charles I. Even since that time, indeed, case has continued to be a frequent, if not the more frequent, mode of

[1] Statham Ab. Act. on Case (27 H. VI.). [2] Y. B. 12 Ed. IV. 13, pl. 10.
[3] Y. B. 2 H. VII. 11, pl. 9; Keilw. 77, pl. 25; Keilw. 160, pl. 2; Y. B. 27 H. VIII. 25, pl. 3. [4] Keilw. 160, pl. 2 (1510).

declaring against a bailee.[1] Oddly enough, the earliest attempts to charge bailees in assumpsit were made when the bailment was gratuitous. These attempts, just before and after 1600, were unsuccessful, because the plaintiffs could not make out any consideration.[2] The gratuitous bailment was, of course, not a benefit, but a burden to the defendant; and, on the other hand, it was not regarded as a detriment, but an advantage to the plaintiff. But in 1623 it was finally decided, not without a great straining, it must be conceded, of the doctrine of consideration, that a bailee might be charged in assumpsit on a gratuitous bailment.[3]

The analogy between the action against the bailee and that against the surgeon holds also in regard to the necessity of alleging an express *assumpsit* of the defendant. Bailees whose calling was of a *quasi* public nature were chargeable by the custom of the realm, without any express undertaking. Accordingly, so far as the reported cases and precedents disclose, an *assumpsit* was never laid in a count in case against a common carrier[4] or innkeeper[5] for the loss of goods. They correspond to the smith, who, from the nature of his trade, was bound to shoe skilfully. But, in order to charge other bailees, proof of an express *assumpsit* was originally indispensable. An *assumpsit* was accordingly laid as a matter of course in the early cases and precedents. Frowyk, C.J., says, in 1505, that the bailee shall be charged "*per cest parol super se assumpsit.*"[6] In Fooley *v.* Preston,[7] Anderson, Chief Justice of the Common Bench, mentions, it is true, as a peculiarity of the Queen's Bench, that "it is usual and frequent in B. R. if I deliver to you an objection to rebail unto me, I shall have an action upon the case without an express promise." And yet, twelve years later, in

[1] In Williams *v.* Lloyd, W. Jones, 179; Anon., Comb. 371; Coggs *v.* Bernard, 2 Ld. Ray. 909; Shelton *v.* Osborne, 1 Barnard. 260; 1 Selw. N. P. (13 ed.) 348, s. c.; Brown *v.* Dixon, 1 T. R. 274, the declarations were framed in tort.

[2] Howlet *v.* Osborne, Cro. El. 380; Riches *v.* Briggs, Cro. El. 883, Yelv. 4; Game *v.* Harvie, Yelv. 50; Pickas *v.* Guile, Yelv. 128. See, also, Gellye *v.* Clark, Noy, 126, Cro. Jac. 188, s. c.; and compare Smith's case, 3 Leon. 88.

[3] Wheatley *v.* Low, Palm. 281, Cro. Jac. 668, s. c.

[4] 1 Roll. Ab. 2, pl. 4; Rich *v.* Kneeland, Hob. 17; 1 Roll. Ab. 6, pl. 4; Kenrig *v.* Eggleston, Al. 93; Nichols *v.* More, 1 Sid. 36; Morse *v.* Slue, 1 Vent. 190, 238; Levett *v.* Hobbs, 2 Show. 127; Chamberlain *v.* Cooke, 2 Vent. 75; Matthews *v.* Hoskins, 1 Sid. 244; Upshare *v.* Aidee, Com. 25; Herne's Pleader, 76; Brownl. Ent. 11; 2 Chitty, Pl. (1 ed.) 271.

[5] Y. B. 42 Lib. Ass. pl. 17; Y. B. 2 H. IV. 7, pl. 31; Y. B. 11 H. IV. 45, pl. 18; Cross *v.* Andrews, Cro. El. 622; Gellye *v.* Clark, Cro. Jac. 189; Beedle *v.* Norris, Cro. Jac. 224; Herne's Pleader, 170, 249.

[6] Keilw. 77, pl. 25.

[7] 1 Leon. 297.

Mosley *v.* Fosset [1] (1598), which was an action on the case for the loss of a gelding delivered to the defendant to be safely kept and redelivered on request, the four judges of the Queen's Bench, although equally divided on the question whether the action would lie without a request, which would have been necessary in an action of detinue, "all agreed that without such an *assumpsit* the action would not lie." [2] But with the lapse of time an express undertaking of the bailee ceased to be required, as we have already seen it was dispensed with in the case of a surgeon or carpenter. The acceptance of the goods from the bailor created a duty to take care of them in the same manner that a surgeon who took charge of a patient became bound, without more, in modern times, to treat him with reasonable skill.

Symons *v.* Darknoll [3] (1629) was an action on the case against a lighterman, but not a common lighterman, for the loss of the plaintiff's goods. "And, although no promise, the court thought the plaintiff should recover." Hyde, C.J., adding: "Delivery makes the contract." The later precedents in case, accordingly, omit the *assumpsit*.[4]

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[1] Moore, 543, pl. 720; 1 Roll. Ab. 4, pl. 5, s. c. The criticism in Holmes' "Common Law," 155, n. 1, of the report of this case seems to be without foundation.

[2] See also Evans *v.* Yeoman (1635), Clayt. p. 33: "Assumpsit. The case upon evidence was, that whereas the plaintiff did deliver a book or charter to the defendant, it was holden that unless there had been an express promise to redeliver this back again, this action will not lie."

The writer is tempted to suggest here an explanation of an anomaly in the law of waste. If, by the negligence of a tenant-at-will, a fire breaks out and destroys the house occupied by him as tenant, and another also belonging to his landlord, he must respond in damages to the landlord for the loss of the latter, but not of the former. Lothrop *v.* Thayer, 138 Mass. 466. This is an illustration of the rule that a tenant-at-will is not liable for negligent or permissive waste. Is it not probable that the tenant-at-will and a bailee were originally regarded in the same light? In other words, neither was bound to guard with care the property intrusted to him in the absence of a special undertaking to that effect. This primitive conception of liability disappeared in the case of chattels, but persisted in the case of land, as a rule affecting real property would naturally persist. In the Countess of Salop *v.* Crompton, Cro. El. 777, 784, 5 Rep. 13, s. c., a case against a tenant-at-will, Gawdy, J., admits the liability of a shepherd for the loss of sheep, "because he there took upon him the charge. But here he takes not any charge upon him, but to occupy and pay his rent." So also in Coggs *v.* Bernard, 2 Ld. Ray. 909. Powell, J., referring to the case of the Countess of Salop, says: "An action will not lie against a tenant-at-will generally, if the house be burnt down. But if the action had been founded upon a special undertaking, as that in consideration the lessor would let him live in the house he promised to deliver up the house to him again in as good repair as it was then, the action would have lain upon that special undertaking. But there the action was laid generally."

[3] Palm. 523. See, also, Stanian *v.* Davies, 2 Ld. Ray. 795.

[4] 2 Inst. Cler. 185; 2 Chitty, Pl. (7 ed.) 506, 507.

There is much in common between the two classes of actions on the case already discussed and still a third group of actions on the case, namely, actions of deceit against the vendor of a chattel upon a false warranty. This form of action, like the others, is ancient, being older, by more than a century, than special assumpsit. The words *super se assumpsit* were not used, it is true, in a count upon a warranty; but the notion of undertaking was equally well conveyed by "*warrantizando vendidit.*"

Notwithstanding the undertaking, this action also was, in its origin, a pure action of tort. In what is, perhaps, the earliest reported case upon a warranty,[1] the defendant objects that the action is in the nature of covenant, and that the plaintiff shows no specialty but "*non allocatur*, for it is a writ of trespass." There was regularly no allusion to consideration in the count in case; if, by chance, alleged, it counted for nothing.[2] How remote the action was from an action of contract appears plainly from a remark of Choke, J.: "If one sells a thing to me, and another warrants it to be good and sufficient, upon that warranty made by parol, I shall not have an action of deceit; but if it was by deed, I shall have an action of covenant."[3] That is to say, the parol contract of guaranty, so familiar in later times, was then unknown. The same judge, and Brian, C.J., agreed, although Littleton, J., inclined to the opposite view, that if a servant warranted goods which he sold for his master, that no action would lie on the warranty. The action sounding in tort, the plaintiff, in order to charge the defendant, must show, in addition to his undertaking, some act by him, that is, a sale; but the owner was the seller, and not the friend or servant, in the cases supposed. A contract, again, is, properly, a promise to act or forbear in the future. But the action under discussion must be, as Choke, J., said, in the same case, upon a warranty of a thing present, and not of a thing to come. A vendor who gives a false warranty may be charged to-day, of course, in contract; but the conception of such a warranty, as a contract, is quite modern. Stuart *v.* Wilkins,[4] decided in 1778, is said to have been the first instance of an action of assumpsit upon a vendor's warranty.

We have seen that an express undertaking of the defendant was

[1] Fitz. Ab. Monst. de Faits, pl. 160 (1383).
[2] Moor *v.* Russel, Skin. 104; 2 Show. 284, s. c.
[3] Y. B. 11 Ed. IV. 6, pl. 11.
[4] 3 Doug. 18.

originally essential to the actions against surgeons or carpenters, and bailees. The parallel between these actions and the action on a warranty holds true on this point also. A case in the Book of Assises is commonly cited, it is true, to show that from very early times one who sold goods, knowing that he had no title to them, was liable in an action on the case for deceit.[1] This may have been the law.[2] But, this possible exception apart, a vendor was not answerable to the vendee for any defect of title or quality in the chattels sold, unless he had either given an express warranty, or was under a public duty, from the nature of his calling, to sell articles of a certain quality. A taverner or vintner was bound as such to sell wholesome food and drink.[3] Their position was analogous to that of the smith, common carrier, and innkeeper.

The necessity of an express warranty of quality in all other cases is illustrated by the familiar case of Chandelor *v.* Lopus[4] (1606–1607). The count alleged that the defendant sold to the defendant a stone, affirming it to be a bezoar stone, whereas it was not a bezoar stone. The judgment of the King's Bench, that the count was bad, was affirmed in the Exchequer Chamber, all the justices and barons (except Anderson, C.J.) holding "that the bare affirmation that it was a bezoar stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezoar stone, it is not material; for every one in selling his wares will affirm that his wares are good, or that his horse is sound; yet, if he does not warrant them to be so, it is no cause of action." The same doctrine is repeated in Bailie *v.* Merrill.[5] The case of Chandelor *v.* Lopus has recently found an able defender in the pages of this REVIEW. In the number for November, 1887, Mr. R. C. McMurtrie urges that the decision was a necessary consequence of the rule of pleading, that the pleader must state the legal effect of his evidence, and not the evidence itself. It is possible that the judgment would have been arrested in Chandelor *v.* Lopus, if it had come before an English court of the present century.[6] But it is

[1] 3 Y. B. 42, Lib. Ass. pl. 8.

[2] But see Kenrick *v.* Burges, Moore, 126, per Gawdy, J., and Roswell *v.* Vaughan, Cro. Jac. 196, per Tanfield, C.B.

[3] Y. B. 9 H. VI. 53, pl. 37; Keilw. 91, pl. 16; Roswell *v.* Vaughan, Cro. Jac. 196; Burnby *v.* Bollett, 16 M. & W. 644, 654.

[4] Dy. 75 a, n. (23); Cro. Jac. 4.

[5] 1 Roll. R. 275. See also Leakins *v.* Clizard, 1 Keb. 522, per Jones.

[6] But see Crosse *v.* Gardner, 3 Mod. 261, Comb. 142, s. c.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

certain that the judges in the time of James I. did not proceed upon this rule of pleading. To their minds the word "warrant," or, at least, a word equally importing an express undertaking, was as essential in a warranty as the words of promise were in the Roman *stipulatio*. The modern doctrine of implied warranty, as stated by Mr. Baron Parke in Barr *v.* Gibson,[1] "But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description," would have sounded as strangely in the ears of the early lawyers as their archaic doctrine sounds in ours. The warranty of title stood anciently upon the same footing as the warranty of quality.[2] But in Lord Holt's time an affirmation was equivalent to a warranty,[3] and to-day a warranty of title is commonly implied from the mere fact of selling.[3]

However much the actions against a surgeon or carpenter for misfeasance, those against a bailee for negligent custody, and, above all, those against a vendor for a false warranty, may have contributed, indirectly, to the introduction of special assumpsit, there is yet a fourth class of cases which seem to have been more intimately connected with the development of the modern parol contract than any of those yet considered. These cases were, also, like the actions for a false warranty, actions on the case for deceit. That their significance may be fully appreciated, however, it will be well to give first a short account of the successive attempts to maintain an action for the simple breach of a naked parol promise, *i.e.*, for a pure nonfeasance.

The earliest of these attempts was in 1400, when an action was brought against a carpenter for a breach of his undertaking to build a house. The court was unanimous against the plaintiff, since he counted on a promise, and showed no specialty.[5] In the same reign there was a similar case with the same result.[6] The harmony of judicial opinion was somewhat interrupted fifteen years later in a case against a millwright on a breach of promise to build a mill within a certain time. Martin, J., like his prede-

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[1] 3 M. & W. 390.

[2] Co. Lit., 102 a; Springwell *v.* Allen (1649) Al. 91, 2 East, 448, n. (a), s. c.

[3] Crosse *v.* Gardner, 3 Mod. 261; 1 Show. 65, s. c.; Medina *v.* Stoughton, 1 Ld. Ray. 593, 1 Salk. 210, s. c.

[4] Eichholtz *v.* Bannister, 17 C. B. N. S. 708; Benj. Sale (3 ed.), 620–631.

[5] Y. B. 2 H. IV. 3, pl. 9.

[6] Y. B. 11 H. IV. 33, pl. 60. See also 7 H. VI. 1, pl. 3.

cessors, was against the action; Cockayne, J., favored it. Babington, C.J., at first agreed with Cockayne, J., but was evidently shaken by the remark of Martin, J.: "Truly, if this action is maintained, one shall have trespass for breach of any covenant[1] in the world," for he then said: "Our talk is idle, for they have not demurred in judgment. Plead and say what you will, or demur, and then it can be debated and disputed at leisure." The case went off on another point.[2] Martin, J., appears finally to have won over the Chief Justice to his view, for, eight years later, we find Babington, C.J., Martin and Cotesmore, JJ., agreeing in a *dictum* that no action will lie for the breach of a parol promise to buy a manor. Paston, J., showed an inclination to allow the action.[3] In 1435 he gave effect to this inclination, holding, with Juyn, J., that the defendant was liable in an action on the case for the breach of a parol promise to procure certain releases for the plaintiff.[4] But this decision was ineffectual to change the law. Made without a precedent, it has had no following. The doctrine laid down in the time of Henry IV. has been repeatedly reaffirmed.[5]

The remaining actions on the case for deceit before mentioned may now be considered. In the first of these cases the writ is

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[1] Covenant was often used in the old books in the sense of agreement, a fact sometimes overlooked, as in Hare, Contracts, 138, 139.

[2] Y. B. 3 H. VI. 36, pl. 33. One of the objections to the count was that it did not disclose how much the defendant was to have for his work. The remarks of the judges and counsel upon this objection seem to have been generally misapprehended. Holmes, Common Law, 267, 285; Hare, Contracts, 162. The point was this: Debt would lie only for a sum certain. If, then, the price had not been agreed upon for building the mill, the millwright, after completing the mill, would get nothing for his labor. It could not, therefore, be right to charge him in an action for refusing to throw away his time and money. Babington, C.J., and Cockayne, J., admitted the force of this argument, but the latter thought it must be intended that the parties had determined the price to be paid. There is no allusion in the case to a *quid pro quo*, or a consideration as a basis for the defendant's promise. Indeed, the case is valueless as an authority upon the doctrine of consideration.

[3] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. [4] Y. B. 14 H. VI. 18, pl. 58.

[5] Y. B. 20 H. VI. 25, pl. 11, per Newton, C.J.; Y. B. 20 H. VI. 34, pl. 4, per Ayscoghe, J.; Y. B. 37 H. VI. 9, pl. 18, per Moyle, J.; Y. B. 2 H. VII. 11, pl. 9, and Y. B. 2 H. VII. 12, pl. 15, per Townsend, J.; 18 H. VII. Keilw. 50, pl. 4, per curiam; Doct. & St. Dial. II. c. 24; Coggs *v.* Bernard, 2 Ld. Ray. 909, 919, per Lord Holt; Elsee *v.* Gatward, 5 T. R. 143. Newton, C.J., said on several occasions (Y. B. 19 H. VI, 24 b, pl. 47; Y. B. 20 H. VI. 34, pl. 4; Y. B. 22 H. VI. 43, pl. 28) that one who bargained to sell land for a certain sum to be paid might have debt for the money, and, therefore, on the principle of reciprocity, was liable in an action on the case to his debtor. But this view must be regarded as an idiosyncracy of that judge, for his premise was plainly false. There was no *quid pro quo* to create a debt.

given, and the reader will notice the striking resemblance between its phraseology and the later count in assumpsit. The defendant was to answer for that he, for a certain sum to be paid to him by the plaintiff, undertook to buy a manor of one J. B. for the plaintiff; but that he, by collusion between himself and one M. N., contriving cunningly to defraud the plaintiff, disclosed the latter's evidence, and falsely and fraudulently became of counsel with M. N., and bought the manor for M. N., to the damage of the plaintiff. All the judges agreed that the count was good. Babington, C.J.: "If he discovers his counsel, and becomes of counsel for another, now that is a deceit, for which I shall have an action on my case." Cotesmore, J.: "I say, that matter lying wholly in covenant may by matter *ex post facto* be converted into deceit. . . . When he becomes of counsel for another, that is a deceit, and changes all that was before only covenant, for which deceit he shall have an action on his case." [1]

The act of the defendant did not affect, it is true, the person or physical property of the plaintiff. Still, it was hardly an extension of the familiar principle of misfeasance to regard the betrayal of the plaintiff's secrets as a tortious invasion of his rights. But the judges encountered a real difficulty in applying that principle to a case that came before the Exchequer Chamber a few years later.[2] It was a bill of deceit in the King's Bench, the plaintiff counting that he bargained with the defendant to buy of him certain land for £100 in hand paid, but that the defendant had enfeoffed another of the land, and so deceived him. The promise not being binding of itself, how could the enfeoffment of a stranger be a tortious infringement of any right of the plaintiff? What was the distinction, it was urged, between this case and those of pure nonfeasance, in which confessedly there was no remedy? So far as the plaintiff was concerned, as Ayscoghe, J., said, "it was all one case whether the defendant made a feoffment to a stranger or kept the land in his own hands." He and Fortescue, J., accordingly thought the count bad. A majority of the judges, however, were in favor of the action. But the case was adjourned. Thirty-five years later (1476), the validity of the action in a similar case was impliedly recognized.[3] In 1487 Townsend, J., and Brian, C.J., agreed that a traverse of the feoffment to the stranger was a good

[1] Y. B. 11 H. VI. 18, pl. 10, 24, pl. 1, 55, pl. 26. See also Y. B. 20 H. VI 25, pl. 11.
[2] Y. B. 20 H. VI. 34, pl. 4.
[3] Y. B. 16 Ed. IV. 9, pl. 7.

traverse, since "that was the effect of the action, for otherwise the action could not be maintained." [1] In the following year,[2] the language of Brian, C.J., is most explicit: "If there be an accord between you and me that you shall make me an estate of certain land, and you enfeoff another, shall I not have an action on my case? *Quasi diceret sic. Et Curia cum illo.* For when he undertook to make the feoffment, and conveyed to another, this is a great misfeasance."

In the Exchequer Chamber case, and in the case following, in 1476, the purchase-money was paid at the time of the bargain. Whether the same was true of the two cases in the time of Henry VII., the reports do not disclose. It is possible, but by no means clear, that a payment contemporaneous with the promise was not at that time deemed essential. Be that as it may, if money was in fact paid for a promise to convey land, the breach of the promise by a conveyance to a stranger was certainly, as already seen, an actionable deceit by the time of Henry VII. This being so, it must, in the nature of things, be only a question of time when the breach of such a promise, by making no conveyance at all, would also be a cause of action. The mischief to the plaintiff was identical in both cases. The distinction between misfeasance and nonfeasance, in the case of promises given for money, was altogether too shadowy to be maintained. It was formally abandoned in 1504, as appears from the following extract from the opinion of Frowyk, C.J.: "And so, if I sell you ten acres of land, parcel of my manor, and then make a feoffment of my manor, you shall have an action on the case against me, because I received your money, and in that case you have no other remedy against me. And so, if I sell you my land and covenant to enfeoff you and do not, you shall have a good action on the case, and this is adjudged. . . . And if I covenant with a carpenter to build a house and pay him £20 for the house to be built by a certain day, now I shall have a good action on my case because of payment of money, and still it sounds only in covenant and without payment of money in this case no remedy, and still if he builds it and misbuilds, action on the case lies. And also for nonfeasance, if money paid case lies." [3]

[1] Y. B. 2 H. VII. 12, pl. 15. [2] Y. B. 3 H. VII. 14, pl. 20.

[3] Keilw. 77, pl. 25, which seems to be the same case as Y. B. 20 H. VII. 8, pl. 18. 21 H. VII. 41, pl. 66, per Fineux, C.J., *accord.* See also Brooke's allusion to an "action on the case upon an *assumpsit pro tali summa.*" Br. Ab. Disceit, pl. 29.

The gist of the action being the deceit in breaking a promise on the faith of which the plaintiff had been induced to part with his money or other property, it was obviously immaterial whether the promisor or a third person got the benefit of what the plaintiff gave up. It was accordingly decided, in 1520, that one who sold goods to a third person on the faith of the defendant's promise that the price should be paid, might have an action on the case upon the promise.[1] This decision introduced the whole law of parol guaranty. Cases in which the plaintiff gave his time or labor were as much within the principle of the new action as those in which he parted with property. And this fact was speedily recognized. In Saint-Germain's book, published in 1531, the student of law thus defines the liability of a promisor: "If he to whom the promise is made have a charge by reason of the promise, . . . he shall have an action for that thing that was promised, though he that made the promise have no worldly profit by it."[2] From that day to this a detriment has always been deemed a valid consideration for a promise if incurred at the promisor's request.[3]

Jealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit. Fairfax, J., in 1481, advised pleaders to pay more attention to actions on the case, and thereby diminish the resort to Chancery;[4] and Fineux, C.J., remarked, after that advice had been followed and sanctioned by the courts, that it was no longer necessary to sue a *subpœna* in such cases.[5]

That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases. In one of

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[1] Y. B. 12 H. VIII. 11, pl. 3. [2] Doct. and Stud. Dial. II. c. 24.

[3] Y. B. 27 H. VIII. 24, pl. 3; Webb's Case (1578), 4 Leon. 110; Richards *v.* Bartlett (1584), 1 Leon. 19; Baxter *v.* Read (1585), 3 Dyer, 272, b. note; Foster *v.* Scarlett (1588), Cro. El. 70; Sturlyn *v.* Albany (1588), Cro. El. 57; Greenleaf *v.* Barker (1590), Cro. El. 193; Knight *v.* Rushworth (1596), Cro. El. 469; Bane's Case (1611), 9 Rep. 93, b. These authorities disprove the remark of Mr. Justice Holmes (Common Law, 287) that "the law oscillated for a time in the direction of reward, as the true essence of consideration." In the cases cited in support of that remark the argument turned upon the point of benefit, as the only arguable point. The idea that the plaintiff in those cases had, in fact, incurred a detriment would have seemed preposterous. Professor Langdell's observations (Summary of Contract, § 64) are open to similar criticism.

[4] Y. B. 21 Ed. IV. 23, pl. 6. [5] Y. B. 21 H. VII. 41, pl. 66.

them, in 1378, the defendant promised to convey certain land to the plaintiff, who, trusting in the promise, paid out money in travelling to London and consulting counsel; and upon the defendant's refusal to convey, prayed for a subpœna to compel the defendant to answer of his "disceit."[1] The bill sounds in tort rather than in contract, and inasmuch as even *cestuis que use* could not compel a conveyance by their feoffees to use at this time, its object was doubtless not specific performance, but reimbursement for the expenses incurred. Appilgarth *v.* Sergeantson[2] (1438) was also a bill for *restitutio in integrum*, savoring strongly of tort. It was brought against a defendant who had obtained the plaintiff's money by promising to marry her, and who had then married another in "*grete* deceit."[3] The remaining case, thirty years later,[4] does not differ materially from the other two. The defendant, having induced the plaintiff to become the procurator of his benefice, by a promise to save him harmless for the occupancy, secretly resigned his benefice, and the plaintiff, being afterwards vexed for the occupancy, obtained relief by subpœna.

Both in equity[5] and at law, therefore, a remediable breach of a parol promise was originally conceived of as a deceit; that is, a tort. Assumpsit was in several instances distinguished from contract.[6] By a natural transition, however, actions upon parol promises came to be regarded as actions *ex contractu*.[7] Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised. Again, the liability for a tort ended with the life of the wrong-doer. But after the struggle of a century, it was finally decided that the per-

[1] 2 Cal. Ch. II. [2] 1 Cal. Ch. XLI.

[3] An action on the case was allowed under similar circumstances in 1505, Anon., Cro. El. 79 (cited). [4] Y. B. 8 Ed. IV. 4, pl. 11.

[5] The Chancellor (Stillington) says, it is true, that a subpœna will lie against a carpenter for breach of his promise to build. But neither this remark, nor the statement in Diversity of Courts, Chancerie, justifies a belief that equity ever enforced gratuitous parol promises. But see Holmes, 1 L. Q. Rev. 172, 173; Salmond, 3 L. Q. Rev. 173. The practice of decreeing specific performance of any promises can hardly be much older than the middle of the sixteenth century. Bro. Ab. Act. on Case, pl. 72. But the invalidity of a *nudum pactum* was clearly stated by Saint-Germain in 1531. Doct. & St. Dial. II. Ch. 22, 23, and 24.

[6] Y. B. 27 H. VIII. 24, 25, pl. 3; Sidenham *v.* Worlington, 2 Leon. 224; Banks *v.* Thwaites, 3 Leon. 73; Shandois *v.* Simpson, Cro. El. 880; Sands *v.* Trevilian, Cro Car. 107.

[7] Williams *v.* Hide, Palm. 548, 549; Wirral *v.* Brand, 1 Lev. 165.

sonal representatives of a deceased person were as fully liable for his assumpsits as for his covenants.[1] Assumpsit, however, long retained certain traces of its delictual origin. The plea of not guilty was good after verdict, "because there is a disceit alleged."[2] Chief Baron Gilbert explains the comprehensive scope of the general issue in assumpsit by the fact that "the gist of the action is the fraud and delusion that the defendant hath offered the plaintiff in not performing the promise he had made, and on relying on which the plaintiff is hurt."[3] This allegation of deceit, in the familiar form: "Yet the said C. D., not regarding his said promise, but contriving and fraudulently intending, craftily and subtly, to deceive and defraud the plaintiff," etc.,[4] which persisted to the present century, is an unmistakable mark of the genealogy of the action. Finally, the consideration must move from the plaintiff to-day, because only he who had incurred detriment upon the faith of the defendant's promise, could maintain the action on the case for deceit in the time of Henry VII.

The view here advanced as to the origin of special assumpsit, although reached by an independent process, accords with, it will be seen, and confirms, it is hoped, the theory first proclaimed by Judge Hare.

The origin of *indebitatus assumpsit* may be explained in a few words: Slade's case,[5] decided in 1603, is commonly thought to be the source of this action.[6] But this is a misapprehension. *Indebitatus assumpsit* upon an express promise is at least sixty years older than Slade's case.[7] The evidence of its existence throughout the last half of the sixteenth century is conclusive. There is a note by Brooke, who died in 1558, as follows: "Where one is indebted to me, and he promises to pay before Michaelmas, I may have an action of debt on the contract, or an action on the case on the promise."[8] In Manwood *v.* Burston[9] (1588), Manwood, C.B., speaks of "three manners of considerations upon which an assump-

[1] Legate *v.* Pinchion, 9 Rep. 86; Sanders *v.* Esterby, Cro. Jac. 417.

[2] Corby *v.* Brown, Cro. El. 470; Elrington *v.* Doshant, 1 Lev. 142.

[3] Common Pleas, 53.

[4] In Impey's King's Bench (5 ed.), 486, the pleader is directed to omit these words in declaring against a Peer: "For the Lords have adjudged it a very high contempt and misdemeanor, in any person, to charge them with any species of fraud or deceit."

[5] 4 Rep. 92 a; Yelv. 21; Moore, 433, 667.

[6] Langdell, Cont. § 48; Pollock, Cont. (4 ed.) 144; Hare, Cont. 136, 137; Salmond, 3 L. Q. Rev. 179.

[7] Br. Ab. Act. on Case, pl. 105 (1542).

[8] Br. Ab. Act. on Case, pl. 5.

[9] 2 Leon. 203, 204.

sit may be grounded: (1) A debt precedent, (2) where he to whom such a promise is made is damnified by doing anything, or spends his labor at the instance of the promisor, although no benefit comes to the promisor . . . (3) or there is a present consideration."[1]

The Queen's Bench went even further. In that court proof of a simple contract debt, without an express promise, would support an *indebitatus assumpsit*.[2] The other courts, for many years, resisted this doctrine. Judgments against a debtor in the Queen's Bench upon an implied assumpsit were several times reversed in the Exchequer Chamber.[3] But the Queen's Bench refused to be bound by these reversals, and it is the final triumph of that court that is signalized by Slade's case, in which the jury found that "there was no other promise or assumption, but only the said bargain;" and yet all the judges of England resolved "that every contract executory implied an assumpsit."

Indebitatus assumpsit, unlike special assumpsit, did not create a new substantive right; it was primarily only a new form of procedure, whose introduction was facilitated by the same circumstances which had already made Case concurrent with Detinue. But as an express assumpsit was requisite to charge the bailee, so it was for a long time indispensable to charge a debtor. The basis or cause of the action was, of course, the same as the basis of debt, *i.e.*, *quid pro quo*, or benefit. This may explain the inveterate practice of defining consideration as either a detriment to the plaintiff or a benefit to the defendant.

Promises not being binding of themselves, but only because of the detriment or debt for which they were given, a need was naturally felt for a single word to express the additional and essential requisite of all parol contracts. No word was so apt for the purpose as the word "consideration." Soon after the reign of Henry VIII., if not earlier, it became the practice, in pleading, to lay all

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[1] See further, Anon. (B. R. 1572), Dal. 84, pl. 35; Pulmant's case (C. B. 1585), 4 Leon. 2; Anon. (C. B. 1587), Godb. 98, pl. 12; Gill *v.* Harwood (C. B. 1587), 1 Leon. 61. It was even decided that assumpsit would lie upon a subsequent promise to pay a precedent debt due by covenant. Ashbrooke *v.* Snape (B. R. 1591), Cro. El. 240. But this decision was not followed.

[2] Edwards *v.* Burr (1573), Dal. 108; Anon. (1583), Godb. 13; Estrigge *v.* Owles (1589), 3 Leon. 200.

[3] Hinson *v.* Burridge, Moore, 701; Turges *v.* Beecher, Moore, 694; Paramour *v.* Payne, Moore, 703; Maylard *v.* Kester, Moore, 711.

assumpsits as made *in consideratione* of the detriment or debt.[1] And these words became the peculiar mark of the technical action of *assumpsit*, as distinguished from other actions on the case against surgeons or carpenters, bailees and warranting vendors, in which, as we have seen, it was still customary to allege an undertaking by the defendant.

It follows, from what has been written, that the theory that consideration is a "modification of *quid pro quo*," is not tenable. On the one hand, the consideration of *indebitatus assumpsit* was identical with *quid pro quo*, and not a modification of it. On the other hand, the consideration of detriment was developed in a field of the law remote from debt; and, in view of the sharp contrast that has always been drawn between special assumpsit and debt, it is impossible to believe that the basis of the one action was evolved from that of the other.[2]

Nor can that other theory be admitted by which consideration was borrowed from equity, as a modification of the Roman "*causa*." The word "consideration" was doubtless first used in equity; but without any technical significance before the sixteenth century.[3] Consideration in its essence, however, whether in the form of detriment or debt, is a common-law growth. Uses arising upon a bargain or covenant were of too late introduction to have any influence upon the law of assumpsit. Two out of three judges questioned their validity in 1505, a year after assumpsit was definitively established.[4] But we may go further. Not only was the consideration of the common-law action of assumpsit not borrowed from equity, but, on the contrary, the consideration, which gave validity to parol uses by bargain and agreement, was borrowed from the common law. The bargain and sale of a use, as well as the agreement to stand seised, were not executory contracts, but conveyances. No action at law could ever be brought against a bargainor

[1] In Joscelin *v.* Sheldon (1557), 3 Leon. 4, Moore, 13, Ben. & Dal. 57, pl. 53, s. c., a promise is described as made "in consideration of," etc. An examination of the original records might disclose an earlier use of these technical words in connection with an assumpsit. But it is a noteworthy fact, that in the reports of the half-dozen cases of the reign of Henry VIII. and Edward VI. the word "consideration" does not appear.

[2] See also Mr. Salmond's criticism of this theory, in 3 L. Q. Rev. 178.

[3] 31 H. VI. Fitz. Ab. Subp. pl. 23; Fowler *v.* Iwardby, 1 Cal. Ch. LXVIII.; Pole *v.* Richard, 1 Cal. Ch. LXXXVIII.; Y. B. 20 H. VII. 10, pl. 20; Br. Feff. al use, pl. 40; Benl. & Dal. 16, pl. 20.

[4] Y. B. 21 VIII. 18, pl. 30. The consideration of blood was not sufficient to create a use, until the decision, in 1565, of Sharrington *v.* Strotton, Plow. 295.

or covenantor.[1] The absolute owner of land was conceived of as having in himself two distinct things, the seisin and the use. As he might make livery of seisin and retain the use, so he was permitted, at last, to grant away the use and keep the seisin. The grant of the use was furthermore assimilated to the grant of a chattel or money. A *quid pro quo*, or a deed, being essential to the transfer of a chattel or the grant of a debt,[2] it was required also in the grant of a use. Equity might conceivably have enforced uses wherever the grant was by deed. But the chancellors declined to carry the innovation so far as this. They enforced only those gratuitous covenants which tended to "the establishment of the house" of the covenantor; in other words, covenants made in consideration of blood or marriage.[3]

J. B. Ames.

CAMBRIDGE.

[*To be continued.*]

THE PRINCIPLE OF LUMLEY *v.* GYE, AND ITS APPLICATION.

THE facts in the case of Lumley *v.* Gye[4] may be stated in a few words. The plaintiff, the lessee of a theatre, had made a contract with Johanna Wagner to perform in his theatre for a certain time, with a condition in the contract that she should not sing nor use her talents elsewhere during the term, without the plaintiff's consent in writing. The defendant, whilst the agreement with Wagner was in force, and with full knowledge of its existence, and maliciously intending to injure the plaintiff, persuaded her to break her contract and refuse to perform in the plaintiff's theatre, and to depart from the employment. Mr. Justice Coleridge, in his dissenting opinion in the case, which has

[1] Plow. 298, 308; Buckley *v.* Simonds, Winch, 35–37, 59, 61; Hore *v.* Dix, 1 Sid. 25, 27; Pybus *v.* Mitford, 2 Lev. 75, 77.

[2] That a debt was, as suggested by Professor Langdell (Contracts, § 100), regarded as a grant, finds strong confirmation in the fact that Debt was the exclusive remedy upon a covenant to pay money down to a late period. Chawner *v.* Bowes, Godb. 217. See, also, 1 Roll. Ab. 518, pl. 2 and 3; Brown *v.* Hancock, Hetl. 110, 111, *per Barkley*.

[3] Bacon, St. of Uses (Rowe's ed.), 13–14.

[4] 2 El. & Bl. 216.